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No. 09-224

In the Supreme Court of the United States

STANLEY R. NICKELS,

Petitioner,

v.

GRAND TRUNK WESTERN RAILROAD, INC.,

Respondent.

On Petition for a Writ of Certiorari to United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

The Federal Railroad Safety Act (FRSA) declares that "[l]aws, regulations, and orders related to railroad safety * * * shall be nationally uniform to the extent practicable." 49 U.S.C. § 20106(a)(1). To ensure that uniformity, the FRSA directs the Secretary of Transportation to "prescribe[] a regulation [and] issue[] an order" for every area of railroad safety and expressly preempts any state "law, regulation, or order related to railroad safety" when federal regulations "cover[] the subject matter of the State requirement." *Id.* §§ 20101, 20106(a)(2). Each circuit to reach the issue has held that the FRSA not only preempts state-law actions but also precludes negligence claims brought under the Federal Employers' Liability Act (FELA), 45 U.S.C. § 51, which creates a federal cause of action for railroad employees who are injured as a result of their employer's negligence. Pursuant to the FRSA, the Federal Railroad Administration (FRA) has issued comprehensive track safety regulations, including a regulation—codified at 49 C.F.R. § 213.103—governing "ballast," the crushed stone used to support railroad track. The questions presented are:

1. Whether the Sixth Circuit—in accord with every other circuit to have reached the issue—correctly held that the FRSA precludes a FELA negligence claim where an FRA regulation covers the subject matter of that claim.

2. Whether the Sixth Circuit—the only court of appeals or state high court to have addressed the issue—correctly held that 49 C.F.R. § 213.103 precludes a FELA claim alleging that a railroad was negligent in its selection of a certain size of ballast for use in a particular location.

RULE 29.6 STATEMENT

Grand Trunk Western Railroad Company, the successor to Grand Trunk Western Railroad Incorporated, is a wholly owned subsidiary of its parent company, Grand Trunk Corporation, which is a wholly owned subsidiary of Canadian National Railway Company, a publicly traded Canadian corporation. No other publicly held company owns more than 10% of respondent's stock.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i
RULE 29.6 STATEMENT ii
TABLE OF AUTHORITIES iv
STATEMENT 2
A. Statutory and Regulatory Background 2
1. The Federal Employers' Liability Act 2
2. The Federal Railroad Safety Act 3
3. FRA Regulations 5
B. Ballast 8
C. Proceedings Below 10
1. Proceedings in the District Court 10
2. Proceedings in the Court of Appeals 11
REASONS FOR DENYING THE PETITION 14
I. THERE IS NO CONFLICT AMONG THE LOWER COURTS CONCERNING THE QUESTIONS PRESENTED. 15
A. Every Circuit To Have Reached The Issue Has Held That The FRSA Can Preclude FELA Claims. 15
B. There Is No Conflict Over Whether 49 C.F.R. § 213.103 Precludes A FELA Ballast Claim. 19
II. THE DECISION BELOW IS CORRECT. 24
A. The FRSA Precludes A FELA Claim Whose Subject Matter Is Covered By An FRA Regulation. 24
B. The FRA Ballast Regulation Covers The Subject Matter Of, And Therefore Precludes, Petitioner's FELA Claim. 27
CONCLUSION 29

TABLE OF AUTHORITIES

Page(s)

CASES

Cooper v. *CSX Transp., Inc.*,
No. 05-CV-73392 (E.D. Mich. Oct. 23, 2007) 25

Cooper v. *CSX Transp., Inc.*,
No. 07-2437 (6th Cir.) .....*passim*

CSX Transp., Inc. v. *Easterwood*,
507 U.S. 658 (1993)..... 16

Davis v. *Union Pac. R.R.*,
598 F. Supp. 2d 955 (E.D. Ark. 2009) 19

Grimes v. *Norfolk S. Ry.*,
116 F. Supp. 2d 995 (N.D. Ind. 2000)..... 18

Lane v. *R.A. Sims, Jr., Inc.*,
241 F.3d 439 (5th Cir. 2001)..... 12, 17, 18

Mo. Pac. R.R. v. *R.R Comm'n*,
948 F.2d 179 (5th Cir. 1991)..... 22, 23

Norfolk S. Ry. v. *Box*,
556 F.3d 571 (7th Cir. 2009)..... 20, 21, 22, 23

Norfolk S. Ry. v. *Shanklin*,
529 U.S. 344 (2000)..... 16

Norris v. *Cent. of Ga. R.R.*,
635 S.E.2d 179 (Ga. Ct. App. 2006)..... 8, 9

Riegel v. *Medtronic, Inc.*,
128 S. Ct. 999 (2008)..... 26

S. Pac. Transp. Co. v. *Pub. Utils. Comm'n*,
647 F. Supp. 1220 (N.D. Cal. 1986) (per
curiam) 20, 21

TABLE OF AUTHORITIES—continued

Page(s)

So. Pac. Transp. Co. v. *Pub. Utils. Comm'n*,
820 F.2d 1111 (9th Cir. 1987) 21

Thanasiu v. *CSX Transp., Inc.*,
No. CI 0200506962 (Ohio Ct. Common
Pleas) 25

Thomas v. *BNSF Ry.*,
No. 07-CV-310, 2008 WL 4981569 (N.D.
Okla. Nov. 19, 2008) 19

Urie v. *Thompson*,
337 U.S. 163 (1949) 3

Waymire v. *Norfolk & W. Ry.*,
218 F.3d 773 (7th Cir. 2000) 16, 17, 18

Waymire v. *Norfolk & W. Ry.*,
65 F. Supp. 2d 951 (S.D. Ind. 1999) 17

STATUTES, RULES AND REGULATIONS

45 U.S.C. § 51 2

49 U.S.C. § 20101 ..... 3, 25

49 U.S.C. § 20103(a) 3

49 U.S.C. § 20106 ..... 4, 7

49 U.S.C. § 20106(a) 4

49 U.S.C. § 20106(a)(1) 4, 24

49 U.S.C. § 20106(a)(2) 4

49 U.S.C. § 20106(a)(2)(A) 4

49 U.S.C. § 20106(b) 4

TABLE OF AUTHORITIES—continued

Page(s)

49 U.S.C. § 20106(b)(l)(A) 4
49 U.S.C. § 20106(b)(1)(B)..... 4
49 U.S.C. § 20106(b)(1)(C)..... 4
49 U.S.C. § 20142(a)(3) 6
49 U.S.C. § 20142(a)..... 6, 21
49 U.S.C. § 20142(b)..... 6, 21
49 C.F.R. § 1.49(m)..... 3
49 C.F.R. §§ 213.1–.369..... 5
49 C.F.R. § 213.2 7
49 C.F.R. § 213.33 9
49 C.F.R. § 213.37 ..... 8, 27
49 C.F.R. § 213.55 ..... 8, 9, 22, 27
49 C.F.R. § 213.57 ..... 8, 9, 22, 27
49 C.F.R. § 213.63 ..... 8, 9, 22, 27
49 C.F.R. § 213.103 .....*passim*
49 C.F.R. § 213.103(d) 27
36 Fed. Reg. 20,336 (Oct. 20, 1971) 5
43 Fed. Reg. 10,583 (Mar. 14, 1978)..... 7, 25, 26, 27
44 Fed. Reg. 52,104 (Sept. 6, 1979) 5
47 Fed. Reg. 39,398 (Sept. 7, 1982) 5
62 Fed. Reg. 36,138 (July 3, 1997)..... 8
63 Fed. Reg. 33,992 (June 22, 1998)..... 5, 6, 7, 21

TABLE OF AUTHORITIES—continued

Page(s)

66 Fed. Reg. 1894 (Jan. 10, 2001) 5

71 Fed. Reg. 59,677 (Oct. 11, 2006) 5

92 Ill. Admin. Code § 1546.10(a) 21

92 Ill. Admin. Code § 1546.20(a) 22

9/11 Commission Act of 2007, Pub. L. No. 110-53, Title XV, § 1528, 121 Stat. 266, 453 4

Rail Safety Enforcement and Review Act of 1992, Pub. L. No. 102-365, 106 Stat. 972 6

Federal Railroad Safety Authorization Act of 1994, Pub. L. No. 103-440, 108 Stat. 4615 6

Pub. L. No. 91-458, 84 Stat. 971 (1970) 3

Sup. Ct. R. 10 19

MISCELLANEOUS

H.R. Rep. No. 110-259, *reprinted in* 2007 U.S.C.C.A.N. 119 4

H.R. Rep. No. 91-1194, *reprinted in* 1970 U.S.C.C.A.N 4101 ..... 3, 4

RESPONDENT'S BRIEF IN OPPOSITION

This case does not warrant review. There is no conflict among the circuits as to either question presented.

Every circuit to have reached the issue agrees that the FRSA precludes a FELA negligence action when an FRA regulation covers the subject matter of the suit. Those circuits—the Fifth, Sixth, and Seventh—unanimously recognize that Congress's goal of national uniformity in the regulation of railroad safety would be seriously undermined if plaintiffs were, through FELA actions, allowed to impose additional duties beyond those mandated by the relevant FRA regulation.

Nor is there any conflict as to whether 49 C.F.R. § 213.103 covers, and therefore precludes, a FELA action alleging that the defendant railroad was negligent in selecting "mainline" ballast, rather than smaller "yard" ballast, to support railroad tracks in locations receiving employee foot traffic. Indeed, there can be no conflict because the Sixth Circuit is the *only* circuit or state high court to have addressed that question. There is, moreover, little doubt that the court resolved the issue correctly: 49 C.F.R. § 213.103 (and a host of related regulations incorporated therein) substantially subsumes the subject of ballast selection.

Even if petitioner were correct that the circuits are divided over "whether 49 C.F.R. § 213.103 covers the subject of *walkways adjacent to railroad tracks*" (Pet. i (emphasis added)), this case does not present that question. As petitioner conceded in the district court, and as the Sixth Circuit expressly found below, this case (like the case with which it was consol-

idated below) specifically concerns *ballast that was used to support railroad tracks.* See Pet. App. 14a–15a. By contrast, the allegedly conflicting cases cited by petitioner concern state regulations requiring the construction of non-supportive walkways. The question in those cases, whether 49 C.F.R. § 213.103 covers state regulations mandating walkways adjacent to railroad tracks, is wholly distinct from the question in this case: whether 49 C.F.R. § 213.103 covers a FELA claim alleging that the respondent railroad had a duty to use a particular size of ballast to support its tracks. As to that question, there is no conflict among the circuits.

STATEMENT

A. Statutory and Regulatory Background

1. The Federal Employers' Liability Act

FELA creates a federal cause of action for railroad employees who are injured as a result of their employer's negligence. The pertinent provision provides:

> Every common carrier by railroad while engaging in commerce * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce * * * for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

45 U.S.C. § 51.

FELA neither prohibits nor requires specific conduct on the part of a railroad. Instead, FELA is "founded on common-law concepts of negligence and injury, subject to such qualifications as Congress has imported into those terms." *Urie* v. *Thompson*, 337 U.S. 163, 182 (1949). Because the statute "does not define negligence, leaving that question to be determined * * * by the common law principles as established and applied in the federal courts" (*id.* at 174 (internal quotation marks omitted)), claims brought under FELA are decided by juries on an ad hoc basis.

2. The Federal Railroad Safety Act

In an effort to "promote safety in every area of railroad operations and reduce railroad-related accidents and incidents" (49 U.S.C. § 20101), Congress enacted the FRSA, directing the Secretary of Transportation to "prescribe regulations and issue orders for every area of railroad safety" (49 U.S.C. § 20103(a)).[1]

Recognizing that the railroad industry has "a truly interstate character calling for a uniform body of regulation and enforcement" (H.R. Rep. No. 91-1194, at 13, *reprinted in* 1970 U.S.C.C.A.N. 4101, 4110), Congress "declare[d] that laws, rules, regulations, orders, and standards relating to railroad safety shall be nationally uniform to the extent practicable." Pub. L. No. 91-458 § 205, 84 Stat. 971, 972, (1970). As the House Report accompanying the FRSA concluded, "subjecting the national rail system to a variety of enforcement in 50 different judicial and administrative systems" would not advance "safety

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[1] The Secretary of Transportation has delegated this authority to the FRA. See 49 C.F.R. § 1.49(m).

in the Nation's railroads." H.R. Rep. No. 91-1194 at 11, 1970 U.S.C.C.A.N at 4109. Accordingly, "where the federal government has authority, with respect to rail safety, it preempts the field." *Id.* at 11, 1970 U.S.C.C.A.N. at 4108.

Although amended since its initial passage,[2] the FRSA continues to expressly provide that "[l]aws, regulations, and orders related to railroad safety * * * shall be nationally uniform to the extent practicable." 49 U.S.C. § 20106(a)(1). The statute thus allows a state to "adopt or continue in force a law, regulation, or order related to railroad safety," but only "until the Secretary of Transportation prescribes a regulation or issues an order covering the subject matter of the State requirement."[3]

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[2] Congress amended § 20106 as part of the 9/11 Commission Act of 2007, Pub. L. No. 110-53, Title XV, § 1528, 121 Stat. 266, 453. The amendment retained the prior preemption provision in its entirety, renumbering it as § 20106(a), and added two additional subsections. As noted at the time it was adopted, the restructuring of the preemption provision was "not intended to indicate any substantive change in the meaning of the provision." H.R. Rep. No. 110-259, at 351 (2007) (Conf. Rep.), *reprinted in* 2007 U.S.C.C.A.N. 119, 183. Newly added § 20106(b) clarifies that a preemption defense is unavailable only where the defendant violated: (i) a governing federal regulation (see § (b)(1)(A)); (ii) an internal standard adopted pursuant to such a regulation (see § (b)(1)(B)); or (iii) a state law that is not otherwise preempted by subsection (a)(2) (see § (b)(1)(C)). As the district court found, petitioner has not alleged any of these conditions. See Pet. App. 27a.

[3] The statute also contains a narrowly circumscribed exception, not relevant to this case, that allows states under certain conditions to adopt laws "necessary to eliminate or reduce an essentially local safety or security hazard." 49 U.S.C. § 20106(a)(2)(A).

3. FRA Regulations

Soon after passage of the FRSA, the FRA promulgated initial Track Safety Standards, which "prescribe[d] initial minimum safety requirements for railroad track." 36 Fed. Reg. 20,336, 20,338 (Oct. 20, 1971). "[B]ased on the safety practices of the rail industry at that time, available track-related data, and public comments and testimony" (44 Fed. Reg. 52,104, 52,107 (Sept. 6, 1979)), these initial standards were intended to operate as an evolving set of safety requirements that would "be continually reviewed and revised by FRA in light of technical innovation, the results of the FRA research and development program, and [regulatory] experience" (36 Fed. Reg. at 20,336). In fact, the FRA has revised and expanded the Track Safety Standards several times since their initial promulgation. See, *e.g.*, 71 Fed. Reg. 59,677 (Oct. 11, 2006); 66 Fed. Reg. 1894 (Jan. 10, 2001); 63 Fed. Reg. 33,992 (June 22, 1998); 47 Fed. Reg. 39,398 (Sept. 7, 1982).

Divided into several interconnected subparts, the standards regulate, among other things, train speed, track alignment, track elevation, cross-ties, drainage, and vegetation control. See 49 C.F.R. §§ 213.1–.369. Ballast, the subject of this case, is one of the matters specifically regulated by the FRA. The FRA regulation governing ballast provides:

> § 213.103 Ballast; general.
>
> Unless it is otherwise structurally supported, all track shall be supported by material which will –
>
> (a) Transmit and distribute the load of the track and railroad rolling equipment to the subgrade;

(b) Restrain the track laterally, longitudinally, and vertically under dynamic loads imposed by railroad rolling equipment and thermal stress exerted by the rails;

(c) Provide adequate drainage for the track; and

(d) Maintain proper track crosslevel, surface, and alinement.

49 C.F.R. § 213.103.

Significantly, the ballast regulation was expressly reaffirmed by the FRA after a congressionally mandated safety review. Congress—through the Rail Safety Enforcement and Review Act of 1992, Pub. L. No. 102-365, 106 Stat. 972, as amended by the Federal Railroad Safety Authorization Act of 1994, Pub. L. No. 103-440, 108 Stat. 4615—ordered the FRA to review all of its "regulations related to track safety standards." 49 U.S.C. § 20142(a). Congress specifically directed the FRA to review its regulations in light of "employee safety." 49 U.S.C. § 20142(a)(3). At the conclusion of the mandatory review, the FRA was required to "revise track safety standards, considering safety information presented during the review." 49 U.S.C. § 20142(b). Pursuant to this congressional directive, the FRA convened a working group which—after having "systematically surveyed the existing regulations to identify those sections and subsections that needed updating" (63 Fed. Reg. at 33,993)—unanimously recommended that the FRA ballast regulation set forth in 49 C.F.R. § 213.103 "remain as currently written." 63 Fed. Reg. at 34,006. The FRA "agree[d] with the recommendation," adopted it

as its own, and affirmatively decided to let 49 C.F.R. § 213.103 stand unchanged. *Ibid.*

The FRA ballast regulation is just one part of "an integrated undertaking" that comprises "numerous elements." Policy Statement, 43 Fed. Reg. 10,583, 10,585 (Mar. 14, 1978). Given their interdependence, "[a]s a general rule, it is not possible to reguiate an individual hazard without impacting on other, related working conditions, nor without impacting on the safe transportation of persons and property." *Ibid.* For that reason, "piecemeal regulation * * * would be disruptive and contrary to the public interest." *Id.* at 10,586. It is, therefore, "essential that the safety of railroad operations be the responsibility of a single agency and that that agency undertake new initiatives in an informed and deliberate fashion, weighing the impact of particular proposals on longstanding industry practices and pre-existing regulations." *Id.* at 10,585. The FRA is that agency. The FRA has "special competence" in "traditional areas of railroad operations" and has "developed a special expertise which makes [it] uniquely qualified to play the primary role in the Federal Government's efforts to assure safe employment for railroad employees engaged in activities related to railroad operations." *Ibid.*

Lest "piecemeal regulation" interfere with the agency's "integrated undertaking," in 1998 the FRA promulgated a regulation underscoring the preemptive effect of its track safety standards, which, as noted above, include the ballast regulation. See 49 C.F.R. § 213.2 (reiterating that "[u]nder 49 U.S.C. 20106, issuance of these regulations preempts any State law, regulation, or order covering the same subject matter" except under certain narrowly de-

fined circumstances). Although the regulation merely restates the FRSA preemption provision, the FRA felt compelled to "provide[] a statement of agency intent" that "promotes national uniformity of regulation in accordance with the statute." Track Safety Standards, 62 Fed. Reg. 36,138, 36,146 (July 3, 1997).

B. Ballast

For good reason, the FRA ballast regulation does not dictate what size of ballast should be used in particular locations. Deciding which size of ballast is most likely to satisfy the functional requirements set forth in 49 C.F.R. § 213.103 (as well as the interconnected cross-level, surface, and alignment requirements set forth in 49 C.F.R. §§ 213.55, 213.57, and 213.63) is a complex process that must be undertaken with detailed knowledge of local conditions.

Petitioner's theory of the case is that Grand Trunk was negligent in using larger-sized "mainline" ballast instead of smaller-sized "yard" ballast in various locations where he had to walk during the performance of his job duties. But because it is smaller than mainline ballast, yard ballast provides less structural support for the tracks than mainline ballast.[4] See, *e.g.*, *Norris* v. *Cent. of Ga. R.R.*, 635 S.E.2d 179, 181–82 (Ga. Ct. App. 2006) (noting evidence

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[4] There was uncontroverted evidence of this fact before the court below. See, *e.g.*, J.A. at 209, *Cooper* v. *CSX Transp., Inc.*, No. 07-2437 (6th Cir.) (testimony that larger mainline ballast "helps for the restraint of the track to keep it in position"); *id.* at 137 (testimony that mainline ballast is preferable to yard ballast "from the standpoint of supporting and the maintenance of the main track"). *Cooper* and this case were consolidated below. See *infra* n.6.

that mainline ballast was necessary in yard to provide adequate support for switch). Thus, use of yard ballast is more likely to result in swaying trains and derailments, each of which presents its own significant safety hazards to railroad workers. Cf. Pet. App. 17a n.1 (Rogers, J., dissenting) ("By preventing train derailments," through the promulgation of 49 C.F.R. § 213.103, "the FRA is making for much safer employee conditions."). Similarly, because it traps more dirt and other debris than mainline ballast, yard ballast tends to allow more mud to form and more vegetation to grow alongside the tracks, conditions that can both undermine the tracks' structural integrity and pose hazards to workers.[5] See *Norris*, 635 S.E.2d at 182 (noting evidence that mainline ballast was required "'[f]or the water drainage'"). Yard ballast may be sufficient in locations where trains move very slowly and precipitation is rare. But even then, yard ballast may be inappropriate where, for example, open cars are likely to spill materials, such as phosphate or coal, which can easily clog the voids between the ballast stones.

For these reasons, the FRA has decided to leave the judgment as to which ballast is safest in a particular location to the railroad, which alone possesses the requisite local knowledge to ensure that the ballast selected will, under the given conditions, fulfill the functional requirements set forth in exacting de-

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[5] There was also uncontroverted evidence of this fact before the Sixth Circuit. See, *e.g.*, J.A. at 209, *Cooper* v. *CSX Transp., Inc.*, No. 07-2437 (6th Cir.) (testimony that yard ballast would "mud up" and "breakdown under the loads causing muddy conditions and unstable track surfaces" and "inhibit[] the drainage as well").

tail in 49 C.F.R. §§ 213.33, 213.37, 213.55, 213.57, and 213.63.

C. Proceedings Below

Petitioner worked for respondent from 1976 to 2004 as a switchman and conductor, in which roles he often walked on ballast. Pet. App. 25a, 38a–39a. Petitioner alleges that for a two-year period, when working in Lansing, Michigan, his job duties required him to walk primarily upon mainline ballast, which, he asserts, caused him to develop an arthritic toe condition. Pet. 7; Pet. App. 4a, 25a, 41a. This toe condition, he alleges, necessitated surgery in 2004 and ultimately caused him to become medically disabled. Pet. App. 4a, 25a.

1. Proceedings in the District Court

Petitioner filed suit in federal district court, asserting a single claim under FELA. The gravamen of petitioner's complaint was that respondent Grand Trunk was negligent in having selected ballast that was, allegedly, too large and not level. Pet. 7; Pet. App. 5a, 25a.

Following discovery, Grand Trunk moved for summary judgment. In opposing the motion, petitioner framed the issue as whether "plaintiff's complaint [should] be dismissed for failure to present a genuine issue of material fact of defendant's negligence in the selection and maintenance of the track ballast structure." Plf. Mem. in Resp. to Def. Mot. for S.J., at 2, *reproduced in* 6th Cir. J.A. at 237. Petitioner simultaneously conceded that the ballast about which he complains "is an essential component of the track structure." Cf. Plf. Resp. to Def. Stmt. of Material Facts ¶ 4, *reproduced in* 6th Cir. J.A. at 243

(admitting facts set forth in Def. Stmt. of Material Facts ¶ 4, *reproduced in* 6th Cir. J.A. at 231).

The district court granted Grand Trunk summary judgment, holding that petitioner's claim was precluded by the FRSA. Relying on Fifth and Seventh Circuit precedent holding FELA claims predicated on excessive train speed to be precluded by FRA regulations setting maximum allowable speeds, the district court determined that "[i]n the same way that federal speed regulations set uniform national ceilings that a FELA claim of negligence cannot alter, the ballast regulations set a base level that a FELA claim may not augment." Pet. App. 29a (citations omitted). Thus, because "[t]he ballast requirements substantially subsume the subject matter of [petitioner]'s theory of recovery," respondent "owed [petitioner] no duty separate from complying with the federal ballast requirements." *Id.* at 28a–29a. Deciding otherwise, the court warned, would lead to substantial variation in railroad regulations across the nation, "depending upon the vagaries of location and other variables posed by individual FELA claims." *Id.* at 30a.

2. Proceedings in the Court of Appeals

The court of appeals affirmed.[6] The court first addressed "whether a FELA claim is precluded if the same claim would be preempted by the FRSA if brought as a state-law negligence action," and unanimously concluded that such a claim is precluded

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[6] The court of appeals consolidated petitioner's appeal with the plaintiff's appeal in *Cooper* v. *CSX Transportation, Inc.*, No. 07-2437, a case involving substantially similar facts and an identical FELA negligence claim. The plaintiff in that case did not seek review in this Court.

by the FRSA. Pet. App. 7a; see also *id.* at 15a (Rogers, J., dissenting) ("Like the majority, I agree with the well-reasoned holdings from other jurisdictions that a railway-safety claim that would be preempted by the FRSA if brought by a nonemployee under state tort law, would necessarily be precluded by the FRSA if brought by a railroad employee under the FELA."). Observing that "[t]wo of our sister circuits have held that the uniformity demanded by the FRSA 'can be achieved only if [federal rail safety regulations] are applied similarly to a FELA plaintiff's negligence claim and a non-railroad-employee plaintiff's state law negligence claim,'" the court below "agreed" that "[d]issimilar treatment of [state and federal] claims would [make] * * * the railroad safety regulations established under the FRSA virtually meaningless" because a "'railroad could at one time be in compliance with federal railroad safety standards with respect to [state] plaintiffs yet be found negligent under the FELA with respect to [federal] plaintiffs for the very same conduct.'" *Id.* at 7a–8a (quoting *Lane* v. *R.A. Sims, Jr., Inc.*, 241 F.3d 439, 443 (5th Cir. 2001)). Accordingly, the court held that petitioner's "claims are precluded by the FRSA if they would have been preempted if brought by a non-employee under state law." *Id.* at 8a.

Having decided that petitioner's FELA claim *could* be precluded by the FRSA, the court next held that it *was* precluded. Pet. App. 9a. The court began its analysis by noting that the FRA ballast regulation "provides that '*all* track shall be supported by material' able to transmit and distribute track and equipment loads, restrain the track under dynamic loads and thermal stress, provide adequate drainage, and maintain proper track crosslevel, surface, and alinement," *Id.* at 9a–10a (quoting 49 C.F.R.

§ 213.103). Thus, the FRA "has directed railroads to install ballast sufficient to perform key support functions under the conditions applicable to the track" at issue. *Id.* at 11a. The court recognized that because "these conditions necessarily are track-specific," the FRA regulation, "[r]ather than prescribing ballast sizes for certain types or classes of track," instead "leaves the matter [of ballast size] to the railroads' discretion so long as the ballast performs the enumerated support functions." *Id.* at 10a–11a. "In this way," the court concluded, "the regulation substantially subsumes the issue of ballast size." *Id.* at 10a.[7]

The court of appeals specifically rejected petitioner's attempt to reframe the case as one involving walkways "adjacent to the track." Pet. App. 13a–14a. Noting that petitioner's complaint alleges that respondent was negligent for having used oversized ballast "*to support the railroad track* * * * in areas where [petitioner] was required to perform his assigned duties," the court found that petitioner had not alleged negligence with respect to the railroad's selection of ballast in any areas other than "those where track stability and support are concerned." *Id.* at 14a.[8] Thus, the court concluded, "[e]ven to the ex-

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[7] Judge Rodgers dissented from this portion of the Sixth Circuit's decision. In his view, "nothing in 49 C.F.R. § 213.103 or any related regulations addresses the issue of trackside walkways and ballast size." Pet. App. 16a. Thus, while he agreed that the FRSA precludes FELA claims when FRA regulations cover the subject matter of those claims (see *supra* 11–12), he would have held that 49 C.F.R. § 213.103 does not cover, and thus does not preclude, the specific claim at issue here.

[8] The court also noted that the plaintiff in *Cooper*, the case with which this case was consolidated, had likewise admitted that that "[t]he purpose of ballast is to provide support and

tent that the [petitioner] argue[s] oversized ballast was used 'along,' 'adjacent to,' or 'parallel to' the track, [he] do[es] not contend that the ballast in those areas was not being used for stability under § 213.103." *Id.* at 14a–15a. Accordingly, the court held that "49 C.F.R. § 213.103 covers the issue of ballast size and precludes the [petitioner's] FELA claim[]." *Id.* at 15a.

REASONS FOR DENYING THE PETITION

Nothing about this case warrants this Court's attention. There is no conflict in the lower courts as to any issue presented in this case, and the decision below was correct.

There is no conflict over whether the FRSA precludes a FELA claim where an FRA regulation covers the subject matter of that claim. Every federal court of appeals to have previously considered the issue has concluded, as did the Sixth Circuit below, that the FRSA *does* preclude a FELA claim under those circumstances. In joining the Fifth and Seventh Circuits, the Sixth Circuit simply followed the uniform, well-established precedent of its sister circuits.

Nor is there any conflict as to whether the FRSA precludes the particular FELA claim at issue here. Indeed, there can be no conflict as to that issue because thus far the Sixth Circuit is the *only* circuit (or state high court) to have addressed whether 49 C.F.R. § 213.103 precludes a FELA action alleging that the defendant railroad was negligent in its selection of ballast. That the lower courts might be divided, as petitioner asserts, over the preemption of state laws requiring the construction of walkways

adaquate drainage to the track structure." Pet. App. 14a (internal quotation marks omitted).

adjacent to tracks is irrelevant; as the court below made clear, that issue is not presented here. As to the questions that *are* presented here, there is no conflict.

Moreover, the decision below is correct. The FRA ballast regulation, 49 C.F.R. § 213.103, does cover the subject matter of—and does therefore preclude—petitioner's claim. The regulation, which the agency expressly reaffirmed after a congressionally mandated safety review, concerns the selection of ballast. It directs railroads to select ballast that will satisfy various highly detailed, federally mandated performance standards. It leaves the choice of which sized ballast to use in a given location to the railroad given the need to satisfy those exacting performance standards under highly varying local conditions. Inasmuch as petitioner's claim would impose a duty on the railroad to select a particular sized ballast regardless of other considerations, it is covered by 49 C.F.R. § 213.103. The Sixth Circuit was therefore correct in concluding that petitioner's claim is precluded by the FRSA.

Accordingly, this Court's review is not warranted.

I. THERE IS NO CONFLICT AMONG THE LOWER COURTS CONCERNING THE QUESTIONS PRESENTED.

A. Every Circuit To Have Reached The Issue Has Held That The FRSA Can Preclude FELA Claims.

Every federal court of appeals to have considered the question has concluded that the FRSA precludes

a FELA action when an FRA regulation covers the subject matter of that action.[9]

In *Waymire* v. *Norfolk & Western Railway*, 218 F.3d 773 (7th Cir. 2000), the Seventh Circuit considered whether the FRSA and FRA regulations promulgated thereunder precluded FELA claims arising from a collision between a train and a truck. The plaintiff alleged that the train was traveling at an excessive speed and that the railroad had installed inadequate warning devices at the crossing where the accident took place. The train, however, was traveling within the federally prescribed speed limit, and the warning devices installed at the crossing complied with federal standards. See *id.* at 776–77. Recognizing that this Court had found comparable state law claims to be preempted by the FRSA in *CSX Transportation, Inc.* v. *Easterwood*, 507 U.S. 658 (1993), and *Norfolk Southern Railway* v. *Shanklin*, 529 U.S. 344 (2000), the Seventh Circuit held that it "must strike the same result" in FELA cases "in order to uphold FRSA's goal of uniformity." *Waymire*, 218 F.3d at 776. Accordingly, the court held that both of the plaintiff's FELA claims were precluded by the FRSA. See *id.* at 777. With reference to the plaintiff's inadequate warning devices claim, but in words equally applicable to the excessive speed claim, the court stated: "Given that the federal agency empowered by Congress to establish uniform, comprehensive federal safety standards related to warning devices at grade crossings has promulgated such regulations, federal common law

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[9] Petitioner does not identify, and respondent is unaware of, any state high court having addressed the issue.

and statutes on these issues are necessarily displaced." *Ibid.*

The Fifth Circuit reached the same result in *Lane* v. *R.A. Sims, Jr., Inc.*, 241 F.3d 439 (5th Cir. 2001). In *Lane*, a railroad employee sought damages under FELA for injuries he sustained in a railroad crossing collision. The plaintiff argued that the train was traveling at an unsafe speed at the time of the collision, even though it was going below the speed limit established by FRSA regulations. *Id.* at 441. The district court granted summary judgment to the railroad on preclusion grounds, and the plaintiff appealed. Acknowledging "Congress' intent that railroad safety regulations be nationally uniform to the extent practicable" and recognizing that "[s]uch uniformity can be achieved only if the regulations covering train speed are applied similarly to a FELA * * * negligence claim and a * * * state law negligence claim" (*id.* at 443), the Fifth Circuit affirmed. Following *Waymire*, which it found "persuasive" (*ibid.*), the court explained that "[d]issimilar treatment" of federal and state common-law claims "would have the untenable result of making the railroad safety regulations established under the FRSA virtually meaningless: 'The railroad could at one time be in compliance with federal railroad safety standards with respect to certain classes of plaintiffs yet be found negligent under the FELA with respect to other classes of plaintiffs for the very same conduct.'" *Ibid.* (quoting *Waymire* v. *Norfolk & W. Ry.*, 65 F. Supp. 2d 951, 955 (S.D. Ind. 1999), aff'd, 218 F.3d 773 (7th Cir. 2000)). Moreover, the court observed:

> [A]llowing juries in FELA cases to find negligence based on excessive speed, even though it did *not* exceed that set by the FRSA regu-

> lations, would further undermine uniformity, because it would result in the establishment, through such verdicts, of varying, uncertain speed limits at different crossings, as well as different speed limits at the same crossing, depending on the time of day, traffic conditions, and other variables.

Id. at 443–44. Accordingly, the Fifth Circuit held that the FRSA precluded the plaintiff's FELA claim.

The Sixth Circuit's decision here is entirely consistent with both *Lane* and *Waymire*. Indeed, the Sixth Circuit explicitly "agreed" with the Fifth and Seventh Circuits' analysis of the issue in those cases. Pet. App. 8a (citing *Lane* and *Waymire*). Like the circuits to have considered the issue before it, the Sixth Circuit concluded that "any exposure to conflicting standards undermines uniformity" of national railroad safety regulation mandated by Congress. *Ibid.* Given the unanimity among the courts of appeals concerning the preclusive effect of the FRSA, review of this question is not warranted.[10]

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[10] *Grimes* v. *Norfolk S. Ry.*, 116 F. Supp. 2d 995 (N.D. Ind. 2000)—which petitioner quotes (see Pet. 35)—mistakenly states that "the Circuits that have considered the issue" of whether the FRSA precludes FELA claims "are split." *Id.* at 1003. *Grimes* cites *Waymire*, 218 F.3d at 776, in support of that assertion, but the conflict noted in *Waymire* was among various *district* courts. As stated above, each *circuit* to have considered the issue (*i.e.*, the Fifth, Sixth, and Seventh) has concluded that the FRSA precludes a FELA claim when an FRA regulation covers the same subject matter. *See* Pet. App. 7a; *Lane*, 241 F.3d at 443; *Waymire*, 218 F.3d at 777.

B. There Is No Conflict Over Whether 49 C.F.R. § 213.103 Precludes A FELA Ballast Claim.

There is also no conflict among the federal courts of appeals or state courts of last resort concerning the second question presented. Indeed, there can be no conflict inasmuch as the Sixth Circuit is the first and thus far only circuit or state high court to have considered whether the FRSA and 49 C.F.R. § 213.103 preclude a FELA action alleging that a railroad was negligent in its selection of ballast.

Although petitioner cites cases that have, contrary to the decision below, found that 49 C.F.R. § 213.103 does not preclude a FELA claim alleging the negligent selection of ballast (see Pet. 34), each case he cites is from either a district court or an intermediate state court.[11] None is from a federal court of appeals or state court of last resort. In fact, petitioner is unable to identify any decision by any United States court of appeals or state court of last resort, apart from the decision below, that has even considered whether 49 C.F.R. § 213.103 precludes a FELA claim alleging the negligent selection of ballast, much less any such decision "decided * * * in a way that conflicts" with the decision below. Sup. Ct. R. 10.

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[11] One of the cases petitioner cites, *Thomas* v. *BNSF Railway Co.*, No. 07-CV-310, 2008 WL 4981569 (N.D. Okla. Nov. 19, 2008), did not involve ballast or mention 49 C.F.R. § 213.103. Another of the cases he cites, *Davis* v. *Union Pacific Railroad Co.*, 598 F. Supp. 2d 955 (E.D. Ark. 2009), involved ballast, but, unlike this case (see *supra* 13–14), only in an area that "does not support any track or track bed." 598 F. Supp. 2d at 955.

Petitioner asserts that there is a circuit split over "whether 49 C.F.R. § 213.103 covers the subject of walkways adjacent to railroad tracks." Pet. i; *id.* at 29. But even if that were true, this case does not present that question. As noted above (see *supra* 13–14), the court of appeals specifically rejected petitioner's assertion that this case involves walkways "adjacent to the track." Pet. App. 14a. Based on his admissions and contentions in the district court, the Sixth Circuit found that petitioner's allegations of negligent ballast selection concerned areas "where track stability and support are concerned." *Ibid.* Thus, this case involves the selection of ballast that is used to support the tracks, not the construction of walkways adjacent to the tracks.

There is therefore no merit to petitioner's claim (Pet. 30–32) that the decision below conflicts with *Norfolk Southern Railway* v. *Box*, 556 F.3d 571 (7th Cir. 2009), and *Southern Pacific Transportation Co.* v. *Public Utilities Commission*, 820 F.2d 1111 (9th Cir. 1987) (per curiam) ("*SoPac*"). Each of those cases addressed the preemption of state regulations requiring the construction of walkways *adjacent* to railroad tracks, not the preclusion of FELA claims arising from the allegedly negligent selection of ballast used to *support* railroad tracks. Indeed, although he dissented from the decision below and would have held that 49 C.F.R. § 213.103 does not cover the subject matter of petitioner's FELA claim, not even Judge Rogers suggests that the majority opinion conflicts with *Box* or *SoPac*.[12]

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[12] Judge Rogers does not so much as mention *Box*. And although he cites *SoPac*, he does so with a "see also" signal (Pet. App. 20a), indicating that he too recognizes the material dis-

Unlike the FELA claim at issue here, which would have imposed a duty upon the respondent railroad to support its tracks with ballast of a certain size, neither the Illinois regulation at issue in *Box* nor the California regulation at issue in *SoPac* required that a railroad use a particular size ballast to support its tracks. Indeed, neither of the state regulations purported to address track structure at all. The regulation at issue in *SoPac* did nothing more than "require[] railroads to maintain a two-foot wide continuous walkway on each side of their tracks." *S. Pac. Transp. Co.* v. *Pub. Utils. Comm'n*, 647 F. Supp. 1220, 1222 (N.D. Cal. 1986), aff'd, 820 F.2d 1111 (9th Cir. 1987).[13] Similarly, the regulation at issue in *Box* simply required that railroads "provide walkways adjacent to those portions of yard tracks constructed after February 15, 2005 where rail carrier employees frequently work." 92 Ill. Admin. Code § 1546.10(a).

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tinction between (a FELA claim alleging negligence in the selection of) ballast used to support railroad tracks and (a state regulation mandating the construction of) walkways adjacent to railroad tracks.

[13] Moreover, it is far from clear that the result in *SoPac* would be the same today as it was in 1987. The district court decision, which the Ninth Circuit summarily affirmed, rested in part on the district court's view that the FRA had not affirmatively determined that further regulation of employee safety near railroad tracks was unnecessary. See *SoPac*, 647 F. Supp. at 1225–1226. While that might have been true at the time *SoPac* was decided, it is not true today. As noted above (see *supra* 6–7), in 1998 the FRA expressly reaffirmed 49 C.F.R. § 213.103 after a congressionally mandated safety review that had required the FRA to reexamine all of its "regulations related to track safety standards" and to "revise track safety standards" in light of "employee safety." 49 U.S.C. § 20142(a), (b); 63 Fed. Reg. at 33,992.

According to the Seventh Circuit, the state-law requirement addressed in *Box* gave railroads "considerable discretion over the size * * * and materials of the walkways" that the state required be built. 556 F.3d at 574.[14] In contrast, FELA claims like that asserted here would force railroads to use ballast of a particular size and thus deprive railroads of the flexibility they need to satisfy, under widely varying local conditions, the highly detailed federal performance standards that are set forth in 49 C.F.R. §§ 213.55, 213.57, and 213.63 and incorporated in 49 C.F.R. § 213.103. See *supra* 8–10. Indeed, the result in *Box* rests in substantial part on the trial court's determination that the walkway requirement at issue there would not cause drainage problems or otherwise imperil railroad safety, a factual finding that the Seventh Circuit characterized as "not clearly erroneous" given the record in that case. *Box*, 556 F.3d at 574–75. When deciding this case, however, the Sixth Circuit had before it evidence that "yard" ballast, which petitioner maintains respondent was obligated to use to support its track, *does* cause drainage problems and otherwise imperil railroad safety. See *supra* 8–9 & nn.4–5. Thus, even if (contrary to fact) this case did involve walkways adjacent to railroad tracks rather than the selection of ballast used to support those tracks, it is factually distinguishable from *Box*.

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[14] Recognizing that "drainage * * * issues" could affect appropriate ballast size, the Illinois regulation at issue in *Box* does not require the use of ballast at all, but instead allows railroads the flexibility to use, among other materials, "asphalt, concrete, planking [and] grating" when constructing walkways adjacent to tracks. 92 Ill. Admin. Code § 1546.20(a).

So too is *Missouri Pacific Railroad* v. *Railroad Commission*, 948 F.2d 179 (5th Cir. 1991) ("*MoPac*"), another case that petitioner contends is in conflict with *Box*. Like *Box*, but unlike this case, *MoPac* concerned a state regulation "mandat[ing] the construction of walkways 'alongside a railroad track.'" *Id.* at 182. But in *MoPac*, unlike *Box*, the district court found, after conducting a bench trial, "that the construction of walkways would impair drainage and weaken the track support structures." *Id.* at 184. The district court also found that the walkway requirement at issue there would have forced "the railroad to strengthen or enlarge the roadbed beyond [federal] requirements." *Id.* at 183 (internal quotation marks omitted). In affirming the district court's conclusion that the state walkway requirement was preempted by the FRSA under the circumstances of that case, the Fifth Circuit expressly relied on these factual determinations. See *id.* at 183–85. Thus, although the result in *MoPac* is the opposite of that in *Box*, the two decisions are readily reconcilable given their differing facts.

* * *

In sum, this case does not present any question as to which there is conflict among the United States courts of appeals or state courts of final resort. There is no conflict as to whether the FRSA can preclude FELA claims (every such court to consider the issue having agreed it can), nor any conflict as to whether the FRSA precludes the FELA claim asserted here (the Sixth Circuit being the only such court to have considered the issue). Even if there were a conflict as to whether the FRSA preempts state regulations requiring the construction of walkways *adjacent* to railroad tracks, that issue is not presented by this

case, which the court below specifically found only involves allegations concerning the selection of ballast that is used to *support* railroad tracks.

II. THE DECISION BELOW IS CORRECT.

This Court's review of the decision below is also unnecessary because the Sixth Circuit resolved each of the questions presented correctly: The FRSA can preclude FELA claims, and it does preclude the FELA claim asserted here.

A. The FRSA Precludes A FELA Claim Whose Subject Matter Is Covered By An FRA Regulation.

As every circuit to have considered the question has concluded, the FRSA precludes a FELA negligence action when the subject matter of the action is covered by an FRA regulation.

Permitting a FELA action to proceed notwithstanding existence of an FRA regulation covering the same subject matter would undermine the statutory goal that railroad safety regulation "be nationally uniform to the extent practicable." 49 U.S.C. § 20106(a)(1). FELA actions, like all common-law actions, are subject to case-by-case adjudication. Thus, liability might be imposed in one case but not another even though the railroad's conduct in the two cases was identical. Faced with inconsistent verdicts returned by different juries, railroads would not know what conduct is required of them. Verdicts that are not merely inconsistent but outright contradictory pose an even greater threat. For example, one jury, hearing a claim brought by a worker suffering arthritic feet (like petitioner here), might hold a railroad liable for using mainline ballast in a particular rail yard, while another jury, hearing a claim brought by

a worker injured in a derailment, might hold that same railroad liable for not using mainline ballast in the very same yard.[15] The railroad would be in an impossible quandary, and Congress's goal of national uniformity in railroad safety regulation would be "eradicat[ed]" "through patchwork litigation." Pet. App. 29a; see also Opinion and Order, at 7, in *Cooper* v. *CSX Transp., Inc.*, No. 05-CV-73392 (E.D. Mich. Oct. 23, 2007) ("Allowing plaintiff's claim to proceed would undermine the goal of national uniformity by resulting in piecemeal litigation across the nation."), *reproduced in* J.A. at 411, *Cooper* v. *CSX Transp., Inc.*, No. 07-2437 (6th Cir.).

Allowing FELA actions to proceed notwithstanding FRA regulations that cover the same subject matter not only would defeat Congress's goal of national uniformity but also would undermine Congress's goal of "promot[ing] safety in every area of railroad operations." 49 U.S.C. § 20101. Each FRA regulation is part of "an integrated undertaking" that comprises "numerous elements." 43 Fed. Reg. at 10,585. Given their interdependence, "[a]s a general rule, it is not possible to regulate an individual hazard without impacting on other related working conditions, nor without impacting on the safe transportation of persons and property." *Ibid.* But the jury

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[15] As the Sixth Circuit was aware when it issued the decision below, the risk of contradictory claims is real, not hypothetical. The petitioner in this case alleges that the defendant railroad used ballast that was too *large*; the plaintiff in *Thanasiu* v. *CSX Transportation, Inc.*, No. CI 0200506962 (Ohio Ct. Common Pleas), by contrast, alleged that the defendant railroad used ballast that was too *small*. See Addendum to Brief of Defendant-Appellee CSX Transportation, Inc., in *Cooper* v. *CSX Transp., Inc.*, No. 07-2437 (6th Cir.).

that is called upon to hear a particular FELA claim considers that claim in relative isolation without due regard for the myriad implications its decision might have on railroad operations.[16] Moreover, even if it did look beyond the plaintiff's narrow claim, a lay jury would lack the knowledge and expertise required to comprehend the far-reaching effects that imposition of a particular common-law standard would have on railroad operations. Precisely because such "piecemeal regulation * * * would be disruptive and contrary to the public interest," it is, in the FRA's view, "essential that the safety of railroad operations be the responsibility of a single agency and that that agency undertake new initiatives in an informed and deliberate fashion, weighing the impact of particular proposals on long-standing industry practices and pre-existing regulations." 43 Fed. Reg. at 10,585–86. Because FELA tort actions are antithetical to that "informed and deliberate" process, they undermine Congress's goal of "promot[ing] safety in every area of railroad operations" and are therefore precluded to the extent FRA regulations cover the same subject matter.

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[16] In a recent decision finding preemption in the medical device arena, this Court emphasized that "tort law[] applied by juries" produces distorted results because it fails to emulate the cost-benefit analysis that an expert agency would employ. *Riegel* v. *Medtronic, Inc.*, 128 S. Ct. 999, 1008 (2008) ("A jury, on the other hand, sees only the cost of a more dangerous design, and is not concerned with its benefits; the patients who reaped those benefits are not represented in court.").

B. The FRA Ballast Regulation Covers The Subject Matter Of, And Therefore Precludes, Petitioner's FELA Claim.

The FRA has promulgated a regulation, 49 C.F.R. § 213.103, specifically governing the selection of ballast. Not only does the ballast regulation constitute an essential part of the agency's broader regulatory scheme, but the FRA expressly decided to leave the regulation unchanged after conducting a congressionally mandated review of the regulation's impact on employee safety. See *supra* 6–7. Given its content, history, and structure, the ballast regulation covers the subject of, and therefore precludes, petitioner's FELA claim.

The FRA ballast regulation is part of "an integrated undertaking." 43 Fed. Reg. at 10,585. For example, subpart (d) of the regulation requires that the ballast "[m]aintain proper track crosslevel, surface and alinement" (49 C.F.R. § 213.103(d)), three technical characteristics for which highly detailed requirements are in turn set forth in 49 C.F.R. §§ 213.55, 213.57, and 213.63 respectively. Similarly, the selection of ballast directly affects drainage and vegetation growth, which are themselves regulated by 49 C.F.R. §§ 213.33 and 213.37 respectively. Given the intricate matrix of regulations of which the ballast regulation is one part, it is clear that a railroad cannot change the ballast it uses "without impacting on other related working conditions" and "without impacting on the safe transportation of persons and property." 43 Fed. Reg. at 10,585.

Allowing ballast claims such as petitioner's to proceed would open Pandora's box. If FELA plaintiffs were permitted to bring claims based on ballast size, not only might railroads be subject to contradictory

jury verdicts for using ballast that is simultaneously deemed both too large *and* too small (see *supra* 24–25 & n.15), but nothing would stop other plaintiffs from basing claims on other aspects of the ballast. For example, a plaintiff might challenge the shape of the ballast used, contending that angular ballast is more difficult to walk on than smooth ballast. But as is true when deciding which size ballast to use in a particular location, railroad engineers must make complex calculations based on local conditions when selecting the most appropriate shape to use. Smooth ballast may be easier to walk on in some locations under some conditions, but precisely because it is smooth it may permit greater slippage than angular ballast, and thus may be less able to satisfy the functional requirements imposed by the FRA track safety regulations. If ballast claims are not precluded, there could be an unending stream of such cases, each subject to *ad hoc* and possibly inconsistent adjudication, and each contrary to Congress's twin goals of national uniformity in railroad regulation and safety in every area of railroad operations.

Accordingly, the Sixth Circuit was correct in holding that "49 C.F.R. §213.103 covers the issue of ballast size" and therefore "precludes [petitioner's] FELA claim[]." Pet. App. 15a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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